1556 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 1554 (1996); *Velasquez v. Woods, et al.*, 329 F.3d 420, 421 (5th Cir. 2003) (saying "every circuit court to consider this issue has held that the collection of DNA samples from felons pursuant to statutes does not violate the Fourth Amendment." *Shelton v. Gudmanson*, 934 F. Supp. 1048 (W.D. Wis. 1996) (holding non-consensual cheek swabbing to obtain DNA from prisoners, even if by force, is not unreasonable under the Fourth Amendment).

Courts applying the special needs test have upheld DNA database laws as well. "The (federal) DNA Act, while implicating the Fourth Amendment, is a reasonable search and seizure under the special needs exception to the Fourth Amendment's warrant requirement because the desire to build a DNA database goes beyond the ordinary law enforcement need." *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003). Similarly, in *Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999), the Second Circuit held that the Connecticut DNA database statute, which required DNA samples from incarcerated sex offenders, did not violate the Fourth Amendment's right against unreasonable searches because the government's special need, beyond normal law enforcement, in solving crimes, outweighed the inmates' interest in avoiding the intrusion of having a blood sample taken. *See also Green v. Berge*, 354 F.3d 675, 679 (7th Cir. 2004) (applying the special needs test and saying "the intrusion [of taking a DNA sample] on [incarcerated felons'] privacy interest is far less that on unsuspecting pregnant women in a hospital).

The final hope for Petitioners and their fellow prisoners against the positions of all the other circuits as to the constitutionality of the taking of DNA samples for the purpose of keeping a database for use in solving crimes

was the Ninth Circuit. In *United States v. Kincade*, 345 F.3d 1095 (9th Cir. 2003), a panel of that court, in a 2-1 decision said the mandatory taking of a sample from parolees and probationers violated the Fourth Amendment right against unreasonable searches and seizures. That decision was overruled by a majority in an en banc decision which said as follows:

> [T]he DNA profile derived from the defendant's blood sample establishes only a record of the defendant's identity – otherwise personal information in which the qualified offender can claim no right of privacy once lawfully convicted of a qualifying offense (indeed, once lawfully arrested and booked into state custody). For, as we recognized in *Rise* [Supra.] "once a person is convicted of one of the felonies included as predicate offenses under [the DNA Act], his identity has become a matter of state interest and he has lost any legitimate expectation of privacy in the identifying information derived from blood sampling." [cits.].

United States v. Kincade, 379 F.3d 813, 837 (9th Cir. 2004), *cert. denied*, 125 S.Ct. 1638 (2005).

Clearly, there is not a split in the circuits as to the question of whether the mandatory taking of a DNA sample from an incarcerated convicted felon for placement in a DNA database to be used for investigation of crimes, both past and future, and there is not a need for this Court to grant certiorari on the basis of a split in the circuits.

II. The Court Below Properly Differentiated This Case From This Court's Decisions In *City of Indianapolis v. Edmond* and *Ferguson v. City of Charleston* Such That The Decisions Are Not In Conflict.

As the Petitioners state in their brief, the Eleventh Circuit said in this case that the "question of which analysis to apply is more than academic." Petitioners' Appendix, 7a. The Petitioners further charge that the court below "sidestepped the special needs question," and while they say "[t]he decision below attempted to distinguish this case from *Edmond* and *Ferguson* by noting that "the searches they discussed were performed on free persons, not incarcerated felons," they, without citation, argue "[t]his is, however, a distinction without a constitutional difference." Brief of Petitioners, p. 9. Respondents contend this argument is without merit.

As the Court below correctly observed, this Honorable Court has on many occasions upheld searches of prisoners which, if done on free persons would be held to violate the Fourth Amendment. *See, e.g., Hudson v. Palmer*, 468 U.S. 517, 526, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) (stating that prisoners have no Fourth Amendment rights against searches of their prison cells); *Bell v. Wolfish*, 441 U.S. 520, 558, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) (stating prisoners must submit to visual body-cavity searches executed without individualized suspicion). As the Eleventh Circuit correctly noted below, "courts have recognized that prisoners comprise a separate category of persons for purposes of the Amendment." Petitioners' Appendix, p. 9a. Furthermore, while this Honorable Court's decisions in *Ferguson* and *Edmond* clearly set rules for police in dealing with members of the public, as the Eleventh

Circuit points out, neither case condemns suspicionless searches of prisoners by prison personnel or requires a special need.

Courts below have properly weighed the privacy interests of prisoners against the states' interests in solving crimes and reducing recidivism, and all have concluded the states' interests outweigh those of prisoners. This Court's decisions in *Ferguson* and *Edmond* are important and compelling *in dealing with free persons*, but not with prisoners or even parolees and probationers, as the Ninth Circuit pointed out in *Kincade*, *Supra*, 379 F.3d at 832. Because the difference between prison inmates and free persons is not a distinction without a difference, but rather is a distinction with numerous differences, the decision below does not conflict with this Court's decisions in *Ferguson* or *Edmond*. As the decision below does not so conflict, certiorari should not be granted.

III. The Decision Below Does Not Expand *United States v. Knights* Beyond Its Constitutional Limits.

Petitioners misconstrue this Court's decision in *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001) when they say "this Court evaluated the constitutionality of a warrantless search of a probationer's home to obtain evidence to be used in a criminal investigation on a showing of reasonable suspicion alone." Brief of Petitioners, p. 11. In fact, the Court also had before it a case wherein a trial court, in sentencing Knights, had mandated as a condition of Knights' probation, that Knights "submit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by

any probation officer or law enforcement officer." 534 U.S. at 589. When Knights was later arrested on new federal charges based on a warrantless search by a police detective, the District Court granted a motion to suppress the evidence retrieved in the search because the search was for investigatory reasons rather than probationary purposes. The Ninth Circuit affirmed. This Court reversed, saying the condition of probation entitled the law enforcement officers in question to search without a warrant. "We conclude," this Court said, "that the search of Knights was reasonable under our general Fourth Amendment approach of 'examining the totality of the circumstances," [cit.] with the probation search condition being a salient circumstance." 534 U.S. at 118. Importantly, the Court then added:

> The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." [cit.] Knights's status as a probationer subject to a search condition informs both sides of that balance. "Probation, like incarceration, is 'a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty.'" [cit.] Probation is "one point . . . on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service." [cit.] Inherent in the very nature of probation is that probationers "do not enjoy 'the absolute liberty to which every citizen is entitled.'" [cit.] Just as other punishments for criminal convictions curtail an offender's freedoms,

> a court granting probation may impose reasonable conditions that deprive the offender of some freedom enjoyed by law-abiding citizens.

Id. at 118-119.

Clearly, the same logic applies in the present case. The touchstone of the Fourth Amendment is reasonableness, and the court below, and the other circuit courts to have considered the question at issue, have addressed the minimal invasion involved with the taking of DNA samples on such a basis. The courts have unanimously said the taking of a DNA sample from a convicted felon for placement in a DNA database passes constitutional muster, and they have used proper logic to reach such a result. This Court's decision in *Knights* stands as only one of many handed down by this Court which has guided the lower courts in their considerations of the issue at hand.

Under the totality of the circumstances, the searches in question are not unreasonable. While it is true the search of Knights was supported by suspicion in addition to being authorized as a condition of probation, it is important to note that the court below only used *Knights* during its analysis of which test to apply, not in its analysis of whether the search in question was reasonable. "If the Supreme Court approves dispensing with the special needs analysis for probationers, we are persuaded that we may take a similar approach in cases involving prisoners, who enjoy less Fourth Amendment rights." Petitioner's Appendix at 10a. Instead of the *Knights* decision, in upholding the searches in question as reasonable, the Eleventh Circuit looked to the Fourth Circuit's decision in *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992) for its reasoning. Similarly, this Court's reliance in the *Knights* decision on the suspicion of the officers in question came in

its decision regarding the reasonableness of the search, not in the type of test to apply.

To the extent this case may be differentiated from *Knights*, such differences do not bring about a sufficient conflict to demand certiorari in the present case. Respondents urge this Court to do the same thing it did previously in the Ninth Circuit's *United States v. Kincade* decision and the Fourth Circuit's *Jones v. Murray* decision: deny the petition for certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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